

SMALL BUSINESS INFO KIT

2. AVOIDING AND DEALING WITH DISPUTES



Many disputes that end up in court could be avoided if the parties took the time to put their agreement in writing *before* any money changed hands or work was done. Failure to have a written agreement, or failure to read a contract before signing it, can lead to costly misunderstandings, stress and time-consuming disputes.

Before you sign a contract

- Don't rely on a conversation or a hand-shake. If something is important it is necessary to include it in the signed agreement. The agreement should also clearly identify the goods/services to be provided, who is expected to do what, when things will happen and the price, or how the price is to be calculated.
- Have both parties sign the agreement so there is evidence of the agreement.
- Ensure that all terms, including payment terms, are included in the agreement *before* the goods or services are provided. You cannot just add terms and conditions to tax invoices.
- If you are providing services that are charged by the hour, provide an estimate of the likely cost and keep detailed work sheets showing times and a description of the work done. Get these sheets signed by the supervisor of the work.
- Make sure the agreement states who you are dealing with, whether it's a company or an individual. Identify who the authorised key contacts are.
- Make sure your employees know the limits of their authority and whether they can enter into contracts for the company. Make sure this information is in writing.

- Make sure the person you are dealing with has authority to bind their company or is the owner of the business. Write down the position/title that the person has in the business.
- When you *sign* a contract, you are bound by its terms and conditions. Always read written contracts before signing them. If you don't understand the contract, be sure to get legal advice. Don't rely on what the other party says about what the contract terms mean.
- If a service agreement is for a fixed term, understand what happens if you want to end the service agreement early.
- Whenever a dispute arises, communicate with the other party and try to reach a commercial settlement. Taking a claim to court should be your last option.

Get help early when problems start

There may be times during a relationship when parties don't see eye to eye. How you handle disputes can have a huge effect on the success of your business. It's easy for emotions to take over and for an impulse decision to be expensive in the long run. If you make an effort to solve misunderstandings or problems and try to keep a good relationship with the other side you are more likely to be offered a new opportunity and/or get issues sorted out quickly.

The Office of the NSW Small Business Commissioner helps small businesses work out solutions that can prevent and resolve business disputes quickly. Mediation officers give assistance to small businesses on a wide range of issues by: providing information; giving strategic and procedural advice; help with informal negotiation and mediation; and by providing referrals to

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other agencies or options for self-help. We do not give legal advice, but can help you understand when there is a need for this advice.

Office of the NSW Small Business Commissioner

Phone: **1300 795 534**

Email: **we.assist@smallbusiness.nsw.gov.au**

Website: **www.smallbusiness.nsw.gov.au**

Informal negotiation

When parties can't agree on something, the first step is to try to resolve the dispute through informal negotiation. First, re-read the contract and any further correspondence. Having an open discussion, which avoids laying blame, can be a good way for both parties to air their differences and resolve them quickly. If talking does not sort things out, write to the other party, explain the issues and offer options for how problems might be resolved.

In a negotiated agreement, anything is possible. If you reach a resolution, make sure you and the other person write down how the problem was resolved. This can be as simple as one person writing a letter or email to the other person. This provides you both with a document that can be referred to if there is still a misunderstanding or if other problems surface.

If you can't find a solution, further action may be needed to resolve the dispute. Beyond negotiation, the dispute resolution process can become expensive. It may cost you less in the long run to make a modest financial offer to fix the problem, rather than take the step of litigation.

Preparing for your dispute

Whether your matter is dealt with by informal negotiation, mediation, a tribunal or court, it's very important that you prepare your case. Although information about your business is confidential and private, sharing information to convince the other party of the strength of your position may be important. At a tribunal, your aim is to convince a tribunal member. In court you will need to convince the lawyer for the other party and the magistrate or judge. When trying to convince someone of your claim, it's important to clearly present evidence to support your argument.

When you're arguing that your business has suffered a loss due to the action of another party, you can't simply say that it happened – you must prove it.

Legal advice

It's always a good idea to get legal advice. If you know the legal strengths and weaknesses of your case, you're likely to be in a better position to negotiate.

If you choose not to get legal advice, make sure you read your lease or contract thoroughly and understand the relevant sections of the laws that apply to your contract. It's helpful to think about the other party's legal arguments. Be prepared for the discussions that may come up during negotiation, mediation or in a tribunal.

A tribunal is similar to a court. It examines the legal issues of a case, the lease or contract, and other evidence. Therefore, it makes sense to seek legal advice to give your claim legal weight before approaching the tribunal.

Mediation

If the dispute is not settled by informal negotiation, you can apply to the Office of the NSW Small Business Commissioner for mediation. A mediation officer from the Office will contact you and the other party to discuss what's happened. Understanding each perspective helps the mediation officer work with the parties to resolve the problem informally at no cost. If the problem is too complex, then a formal mediation will be arranged where both parties have a face-to-face meeting guided by a mediator.

Mediators are trained to help parties reach a mutual agreement. Generally, each side

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must make some compromise. The mediator is a neutral third party and will not decide whether one party is right or wrong, nor do they decide the outcome or provide legal advice. Instead, they help both parties see the advantages and disadvantages of various options and to consider commercial options that may settle the dispute before it escalates further.

In 2014, mediation costs each party \$152 an hour. Both parties to a dispute are asked to pay \$760 each up front, which covers five hours of mediation. Fees are charged (or refunded) on an hourly basis depending on whether the mediation takes more or less time to resolve the issues.

Most matters are settled at or before mediation. If your matter isn't resolved, most often the next step may be to take your dispute to a tribunal or court. During this stage you can keep negotiating.

Retail lease disputes

For a retail lease dispute, most matters go to the NSW Civil and Administrative Tribunal (the Tribunal) depending on the value of the dispute. Generally, both the landlord and tenant pay their own legal costs. In unusual circumstances the Tribunal may make one party pay all or part of the other side's legal costs.

To take your dispute to the Tribunal, you need to submit an application, supporting documents and application fee to the Tribunal. You can download a copy of the Tribunal application from its website at: www.ncat.nsw.gov.au

(Note: Retail lease matters are dealt with in the Consumer and Commercial Division of the Tribunal).

The Tribunal will ask you for a **'Certificate of Failed Mediation'**, which the Office of the NSW Small Business Commissioner can provide if you write and ask for it.

It's very important to get legal advice before going to the Tribunal or a court. If you decide to represent yourself in the Tribunal, you can find useful information at: www.lawlink.nsw.gov.au

You will find details on the above website about how to make an application, issue and file court documents and other procedures involved with having your case heard before the Tribunal. It's important to make sure that you prepare your case thoroughly. Be ready to argue your case, provide relevant evidence and convince the Tribunal Member of your position.

Your case needs to be set out clearly, with each claim supported by the facts. Letters, photos, conversations and other documents are useful as evidence. If you're trying to prove financial loss, you may need to provide expert accounting reports or cash-flow statements. You might only get one chance to provide the important evidence in a way that is useful to the Tribunal Member.

Ensure that you have read the *Retail Leases Act*, your lease and have studied previous cases similar to yours. You can find these at: www.austlii.com.au
www.lawlink.nsw.gov.au

You also need to be aware that the Tribunal sets deadlines. It is crucial you meet them, whether they are directions made by the Tribunal, or an instruction to return a summons. If you do not comply with the Tribunal's directions, you may end up paying some or all of the other side's legal costs.

Commercial lease or small business disputes

The correct court or tribunal for small business disputes and commercial lease disputes will depend on the amount claimed or in dispute, and the area of law involved. It's very hard to properly have a matter dealt with by any court other than the small claims division of the Local Court if you don't have a solicitor helping you.

Referrals to solicitors who practice in your subject area can be made by phoning the Law Society (NSW): **9926 0156**.

You can also search the Law Society's register of solicitors at: www.lawsociety.com.au

Information about court process, representing yourself and particular areas of law can be located at LawAssist: www.lawassist.lawaccess.nsw.gov.au

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